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Reaffirming Australia's commitment to the Right to Health

Australia has one of the best healthcare systems in the world.[1] Despite this world-class system, Australians are urgently calling for reform as basic healthcare becomes increasingly inaccessible for everyday Australians.[2] The right to health is an internationally recognised right, the deprivation of which impacts the ability of individuals to realise other essential rights, such as the right to work.[3] Australia, as a nation which takes pride in its dedication to the promotion of human rights globally, must re-affirm its commitment to the right to health by seeking to address issues of inaccessibility through widespread reform.

This report makes the following recommendations:

1. The Federal Parliament should enact federal human rights legislation which recognises the right to health as belonging to all Australians;

2. The Federal Parliament should seek to improve the accessibility of medical services through reformation of Medicare by implementing policies that would incentivise treatment providers to 'bulk-bill', including:

    a. Simplification of Medicare billing policies and providing adequate training around Medicare billing to treatment providers.

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[1] Mary Rose Angeles, Paul Crosland and Martin Hensher, 'Challenges for Medicare and universal health care in Australia since 2000' (2023) 218(7) *The Medical Journal of Australia* 322, 322; Sunil K Dixit and Murali Sambasivan, 'A review of the Australian healthcare system: A policy perspective' (2018) 6 *Sage Open Medicine* 1, 1; Avik Roy, 'Key Findings from the 2022 World Index of Healthcare Innovation' (Webpage, 17 March 2023) < https://freopp.org/key-findings-from-the-2022-world-index-of-healthcare-innovation-e2a772f55b92 >; Australian Government Department of Health and Aged Care, *'The Australian health system'* (Webpage, 7 August 2019) < https://www.health.gov.au/about-us/the-australian-health-system#:~:text=It%20is%20jointly%20run%20by,state%20and%20territory%2C%20and%20local.&text=Australia's%20health%20system%20is%20one%20of%20the%20best%20in%20the%20world. >

[2] See for example Stephanie Convery, 'Have you had problems finding affordable healthcare or bulk-billing GP's in Australia', *The Guardian* (online, 10 August 2022) < https://www.proquest.com/docview/2700438311/74B0B34C34D54159PQ/1?accountid=10499 >; Mariam Tokhi, 'My vulnerable patients cannot pay large gap fees. Australia's health system is failing them', *The Guardian* (online, 16 August 2022) < https://www.proquest.com/docview/2702657960/fulltext/36450F99958349E3PQ/1?accountid=10499 >; Melissa Davey, 'Why is my doctor no longer bulk billing and is Medicare in crisis', *The Guardian* (online, 18 August 2022) < https://www.proquest.com/docview/2703669779/21C0F8EB23984ADCPQ/1?accountid=10499 >; Michael McGowan and Adeshola Ore, 'Can't sit in the too-hard basket': premiers push Anthony Albanese to overhaul health system', *The Guardian* (online, 24 May 2022) < https://www.proquest.com/docview/2668570641/fulltext/3D957E4D82C24E2EPQ/1?accountid=10499 >; Cait Kelley, 'Vulnerable Australians missing out on healthcare as insufficient Medicare rebate drives GP shortage', *The Guardian* (online, 30 April 2022) < https://www.proquest.com/docview/2657517606/9FCDA36231A64CE5PQ/2?accountid=10499 >.

[3] World Health Organisation, *'Human Rights'* (Webpage, 10 December 2022) < https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health >.

b. Increasing the Medicare rebate so as to align with the actual costs of providing medical services.

By implementing the above recommendations, Australia would re-affirm its international commitment to the right to health. Adopting these recommendations would not only promote the realisation of the right to health amongst Australians but would also economically benefit the Australian economy by reducing inefficiencies in the existing system whilst also encouraging the realisation of other rights, such as the right to work.

The Right to Health and Australia's Obligations

Australia is a party to five international human rights treaties which recognise the right to health, including the International Covenant on Economic, Social and Cultural Rights *('ICESCR')*.[4] The right to health is best outlined in Article 12 of the ICESCR, which recognises the right of everyone to the enjoyment of the highest attainable standards of physical and mental health.[5] The right to health as articulated in the ICESCR recognises that the right to health includes access to medical services.[6]

The right as articulated in Article 12 of the ICESCR was not intended to be understood as a right to be healthy, but rather a right containing a number of rights and freedoms, including the right to an equally accessible health system which allows individuals to achieve the highest attainable standard of health within the context of their own biological and socio-economic preconditions as well as the States available resources.[7] The Committee on Economic, Social and Cultural Rights determined that a states obligation in relation to the right to health included ensuring (1) sufficient availability of functioning public healthcare facilities, goods and services; (2) equal and sufficient access to healthcare facilities, goods and services, including non-discriminatory, physical accessibility, affordability and availability of information; (3) the provision of culturally appropriate healthcare; and (4) healthcare which is scientifically and medically appropriate and of good quality.[8]

As a party to the ICESCR, Australia has an obligation to promote the right to health by ensuring quality healthcare is available, accessible, and acceptable. Australia's is failing to uphold this obligation with respect to the elements of availability and accessibility and therefore urgent reform is needed.

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[4] *International Covenant on Economic, Social and Cultural Rights,* opened for signatures 16 December 1966, 993 UNTS 3 (entered into force 3 January 1979) *('ICESCR'); International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signatures 21 December 1965, 660 UNTS 1 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child,* opened for signatures 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities,* opened for signatures 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

[5] *ICESCR* (n4*)* art 12.

[6] Ibid art 12(d).

[7] Office of the High Commissioner for Human Rights, *CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) paras 8-9.

[8] Ibid para 12.

The present work acknowledges that Australia's failure with regards to the availability of medical services is largely due to a nation-wide shortage of medical personnel and resources.[9] There is presently little with regards to systemic reform that the Australia government could undertake to address this failure, and therefore this work does not consider this issue. In light of this, the present submissions focus on reformations necessary to addressing issues of accessibility, specifically financial inaccessibility, which is one of the most significant barriers preventing Australians from realising the right to health.

Recommendations and the Need for Reform

1. Recognition of the right to health in Federal Human Rights Legislation

Recognition of the right to health as a core human right belonging to all Australians is the necessary first step in re-affirming Australia's commitment to the right to health and improving Australia's compliance with its humanitarian obligations. The adoption of federal human rights legislation which included the right to health would ensure that the right was a central consideration of all relevant federal legislation, thereby promoting an awareness within the legislature of not only the right, but also how legislation can inadvertently impact upon the realisation of rights and how those impacts can be minimised. The right to health is already recognised in some of Australia's state human rights legislation, indicating that the importance of the right to health has already been recognised in the Australian context.[10]

It is important to note that in addition to the recommendation that federal human rights legislation be adopted, this work also submits that any human rights legislation should include enforcement mechanisms to ensure continued parliamentary consideration and compliance with the legislated rights. This is a feature of the human rights legislation in the ACT[11], Victoria[12] and Queensland[13] all of which contain provisions for the enforcement of human rights, including overriding legislation which is incompatible with the legislated rights by way of executive or judicial review.[14]

2. Improving accessibility to health service by reforming Medicare

The World Health Organisation determined that the system best designed to promote the realisation of the right to health is a system in which individuals can expect access to good quality health services without experiencing financial hardship due to the costs of accessing

[9] Australian Medical Association, 'AMA report projects "staggering" GP shortage', *AMA Rounds* (Online, 25 November 2022) < https://www.ama.com.au/ama-rounds/25-november-2022/articles/ama-report-projects-staggering-gp-shortage >; Mark Rigby and Charlie McKillop, 'Doctor shortage 'will worsen' as young doctors walk away from general practice', *ABC News* (Online, 31 August 2022) < https://www.abc.net.au/news/2022-08-31/gp-shortage-to-worsen-as-junior-doctors-turn-to-specialty-fields/101386674 >; Medical Workforce Reform Advisory Committee, Commonwealth Department of Health, *National Medical Workforce Strategy 2021-2023* (Committee Report, 2021) 14.
[10] *Human Rights Act 2019* (QLD) s 37.
[11] See *Human Rights Act 2004* (ACT) pts 4, 5, 5A.
[12] See *Charter of Human Rights and Responsibilities 2006* (Vic) pts 3.
[13] See *Human Rights Act 2019* (QLD) pts 3.
[14] Paul T Babie, 'Australia's Bill of Rights' (2020) 97(2) *University of Detroit Mercy Law* Review 187, 218.

those services.[15] Medicare does, theoretically, provide this. However, in reality, practitioners are opting not to utilise the scheme, specifically the practice of 'bulk-billing'.

This trend of abandoning the practice of bulk-billing is particularly prominent with respect to the services provided by general practitioners, as evidenced by the experiences of Australians who increasingly struggle to find primary care practitioners who offer bulk-billing.[16] In place of bulk-billed services, medical practitioners are opting for private billing systems which have drastically increased the out-of-pocket costs of Australians seeking medical care.[17] The increased cost of healthcare prevents financially disadvantaged Australians from accessing adequate healthcare. Additionally, financially disadvantaged Australians, as a result of not being able to afford to see their general practitioner, have resorted to either forgoing necessary care, resulting in adverse health outcomes, or seeking non-urgent care from alternative emergency resources, such as hospitals, which adversely impacts the ability of those resources to provide timely care.[18]

One significant reason provided by medical practitioners for abandoning bulk-billing is that the system and policies associated with the practice are too complex, and they are not provided with sufficient training to navigate the abundance of legal complexities associated with the practice.[19] It is therefore more efficient, less complex, and less likely to lead to the commission of an offence by incorrectly billing under the scheme, for medical practitioners to adopt private billing policies. In order to address this issue and promote the financial accessibility of health services, thus promoting the right to health, the Australian federal government should simplify the billing policies and procedures associated with bulk-billing and ensure the provision of adequate training. Implementing this recommendation would also have the additional benefit of reducing financial 'leakage' from Medicare, noting that in 2021 it was estimated that non-compliant medical billing cost Medicare approximately $1.2 to $3.6 billion annually.[20]

The other substantial reason provided by medical providers in relation to their preference from private billing practices is that the Medicare rebate offered as part of the scheme is inadequate

[15] World Health Organisation, *The World Health Report. Health Systems Financing: The path to universal coverage* (Report, 2010) ix, x; Gorik Ooms et al. 'Is universal health coverage the practical expression of the right to health care?' (2014) 14)(1) *BMC International Health and Human Rights* 1.
[16] See generally (n2).
[17] See generally (n2); Margaret Annette Faux, 'Claiming and Compliance under the Medicare Benefits Schedule: A Critical Examination of Medical Practitioner Experiences, Perceptions, Attitudes and Knowledge' (PhD Thesis, University of Technology Sydney, 2021) 6.
[18] Simon Eckermann and Lynnaire Sheridan, 'Supporting Medicare Health, Equity and Efficiency in Australia: Policies Undermining Bulk Billing Need to be Scrapped' (2016) 14(5) *Applied Health Economics and Health Policy* 511, 511-12.
[19] Margaret Annette Faux, Jonathan Wardle and Jon Adams, 'No payments, copayments and faux payments: are medical practitioners adequately equipped to manage Medicare claiming and compliance?' (2015) 45(2) *Internal Medicine Journal* 221, 221-2; see generally Margaret Annette Faux, Submission No 5 to Senate, Parliament of Australia, *Inquiry into the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021 [provisions]* (4 February 2022).
[20] Faux, *'Claimant and Compliance under the Medicare Benefits Schedule'* (n17) 76.

in comparison to the cost of providing the service.[21] As with all businesses, the costs of providing medical care[22] increases with the cost of living and inflation, and these costs are met by the fees a medical practitioner charges for care.[23] Prior to 2013, the Medicare rebate provided to doctors was indexed yearly to ensure that the rebate offered was relative to the cost of providing care.[24] However, noting that indexation was frozen from 2013 to 2018, and that since indexation was recommenced it has occurred on average at a rate of 1.3% annually, the Medicare rebate offered is no longer remotely comparable to the cost of providing care.[25] Medical practitioners therefore either have to absorb these costs, which creates an unviable long-term business model, or pass these costs onto patients, generally through private billing systems, thereby driving up the costs of healthcare and promoting financial inaccessibility.[26] In order to address the financial inaccessibility of accessing healthcare due to high out-of-pocket expenses, the federal government must adjust the Medicare rebate to reflect the actual costs of providing medical services in order to incentivise medical practitioners to adopt bulk-billing practices.

Conclusion

Australia is failing in its obligations to promote the realisation of the right to health due to issues of accessibility and availability. In order to address the issues of accessibility, systemic reform involving the adoption of human rights legislation and reformation of Medicare is necessary. The right to health is an essential human right which impacts the realisation of other essential rights, such as the right to work, education and participation, and in re-affirming their commitment to the right, Australia will benefit economically.

[21] See eg Mariam Tokhi (n 2); Melissa Davey (n 2); Andrew Brown, 'Doctors urge bulk billing incentive boost', *AAP Bulletin Wire* (Online, 29 January 2023) < https://www.proquest.com/docview/2770368535/citation/87D5C528444B4A44PQ/1?accountid=10499 >.
[22] Such as wages, rent, medical equipment, cleaning, electricity, technology and insurance.
[23] Australian Medical Association, *AMA analysis of Medicare indexation freeze* (Report, 31 March 2023) 1.
[24] Ibid.
[25] Ibid.
[26] Ibid.